

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From July 1, 1959
Through September 30, 1959
VOLUME 96

MacDONALD GALLION, Attorney General



1960

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA
For the Period
July 1, 1959
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Volume No. 96

**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF
ALABAMA:**

This Quarterly Report of the Attorney General of Alabama which includes all official opinions rendered by the Attorney General from July 1, 1959, through September 30, 1959, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send several copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MacDONALD GALLION
Attorney General

MacDONALD GALLION
Attorney General

Edwin Strickland
Administrative Assistant

Assistant Attorneys General

Willard W. Livingston
Senior Assistant

Robert P. Bradley
Owen Bridges
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Jerry L. Coe
Paul T. Gish, Jr.
Gordon Madison
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Joseph D. Phelps
John F. Proctor
James L. Screws
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John C. Tyson, III
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Assistant Attorney General Assigned to the Department of
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George O. Miller, Jr.

Assistant Attorney General Assigned to the Department of
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Assistant Attorney General Assigned to the Department of
Examiners and Public Accounts
James T. Hardin

Assistant Attorney General Assigned to the Department of
Finance
Randolph G. Lurie

Assistant Attorney General Assigned to the Department of
Pensions and Security
Julius T. Cage, Jr.

Assistant Attorney General Assigned to the Department of
Revenue
Herbert I. Burson, Jr.
William H. Burton, Jr.
B. Frank Loeb
James R. Payne
H. Grady Tiller

OPINIONS

July 1, 1959

Honorable H. W. Suddath

Clerk

Board of Revenue

P. O. Box 1667

Montgomery 4, Alabama

Attorneys—Counties—Employment, Employers and Employees—
Montgomery County—Opinions overruled, Modified or Dis-
tinguished.

1. Attorney employed by Montgomery County Board of Revenue, pursuant to Title 13, Section 229, Subsection 8, Code of Alabama 1940, is employee of county for purposes of pension provided by Act No. 240, Local Acts 1947, page 165.

2. Opinion reported in Quarterly Report of Attorney General, Vol. 72, page 13, overruled insofar as it conflicts with opinion herein expressed.

Opinion by Assistant Attorney General Mentz.

Dear Sir:

Your request for an official opinion bearing date of June 2, 1959, is as follows:

"The Board of Revenue has requested that I ask your office for an official opinion. On August 4, 1953, the Board of Revenue requested an opinion relative to whether the County Attorney employee came within the meaning of its local pension system. The Pension System is being amended so that the employees shall have the privilege of contributing to the pension system and it is the intention of the Board of Revenue to have certain qualified employees contribute to the pension fund. It is also the desire of the Board of Revenue that this pension system include the County Attorney and that he be allowed to contribute thereto along with the other employees. We believe that the opinion in answer to our request of August 4, 1953, did not cover the precise question asked in that it was intended to simply ask the following questions:

" 'As for pension purposes only under the Montgomery County pension act, is the County Attorney an employee for the purposes of such act?'

"FACTS: The County Attorney is employed to be the legal advisor of the County and is paid exclusively by the County and is the only person employed by the County in any legal capacity. While it is true the County Attorney is not required to devote his full time to his duties, he is employed pursuant to the statute of Alabama, to-wit: Title 13, Section 229, paragraph 8 of the Civil Code of Alabama

in the case of *State v. Stone*, reported in 235 Ala. 233. See page 236, subparagraph (4, 5) wherein, among other things, Mr. Justice Brown stated:

“ ‘Said subdivision confers on the courts of county commissioners and like county boards express power to retain or employ attorneys to represent the county in respect to county affairs where that duty is not expressly delegated and imposed on some other officer.’ ”

“We think, therefore, that a proper construction of this law is such, certainly to the extent of pension paying purposes that the County Attorney is a County employee and for that purpose alone, is the scope of this request. To further readvertise or amend the law would be an unnecessary expense upon the County and I have been requested to call this situation to your attention so that the opinion of the Attorney General reported in Volume 72, page 13, could be withdrawn or overruled so that the true intent of the law as enumerated in the Court's construction by the Supreme Court could be carried out and so that the County Attorney would not be discriminated against for pension purposes due to the opinion reported in Volume 72, page 13.

“For further citations of authorities relative to an attorney being an employee for certain purposes see, 8 N. W. 2d 393, 397; 242 Wis. 491; *O. P. Staggs Co. v. Nixon*, 50 P. 2d 55, 57; 97 Colo. 314; *Seaboard Airline Railway v. Continental Trust Co.* 166 F. 597; *Nbean v. Gibbons*, 265 P. 2d 1023—an ‘employee’ is defined as ‘one who performs services for another for financial consideration exclusive of casual employment.’ ”

The prior opinion of this office stating that an attorney retained by resolution of the Board of Revenue of Montgomery County is not an employee of the county within the provisions of Act No. 240, Local Acts 1947, page 165, which provides a pension system for “employees” of Montgomery County, was based on the ground that an agreement under Title 13, Section 229, Subsection 8, Code of Alabama 1940, providing that county governing bodies may retain or employ attorneys, is construed to be in the nature of a general retainer, rather than a contract for annual employment. Quarterly Report of Attorney General, Vol. 72, page 13.

The conclusion reached in the cited opinion was based on an earlier opinion of this office wherein it was stated that where Chambers County retained an attorney for a period of one year in consideration of \$800.00 paid in advance, the agreement should be construed as being in the nature of a general retainer, rather than a mere contract for annual employment. Quarterly Report of Attorney General, Vol. 65, page 30.

It is significant, however, that the reasoning of the opinion regarding the aforesaid Chambers County agreement was rested on the grounds that the agreement was made on the basis of a lump sum payable in advance, that there was no provision for a monthly salary, and that the words “retain”, “retained” and “retainer” were used throughout the county governing body's resolution with respect to engaging the services of the attorney.

The Board of Revenue of Montgomery County, Alabama, first employed the present County Attorney, pursuant to Title 13, Section 229, Subsection 8, Code of Alabama 1940, on September 3, 1946. The minutes of said Board's regular adjourned meeting held on September 3, 1946, show that he "was appointed attorney for the Board of Revenue of this County, effective as of this date at a salary of \$150.00 per month." The minutes of said Board's meeting held on December 14, 1953, with reference to the County Attorney, contained a motion, which was duly seconded, "that his salary be increased from \$300.00 per month to \$425.00 per month, beginning January 1, 1954." The most recent reference made to the County Attorney by said Board was at its organizational meeting held on November 13, 1956, the minutes of which simply reflect that the incumbent was nominated as Attorney, seconded, and unanimously approved by said Board.

It will be noted that the Board of Revenue of Montgomery County, in discussing the employment of its County Attorney, does not use the word "retain", or any variation thereof, and consistently refers to a specified monthly salary for said attorney. Furthermore, I have been informed verbally by you that, since January 1, 1955, the incumbent County Attorney has been considered and reported as a county employee for social security purposes. See Quarterly Report of Attorney General, Vol. 64, page 108.

In view of the foregoing, it is my opinion that your inquiry should be answered in the affirmative.

The opinion reported in Quarterly Report of Attorney General, Vol. 72, page 13, insofar as it conflicts with the opinion herein expressed, is hereby overruled.

Yours very truly,

MacDONALD GALLION

Attorney General

July 7, 1959

Honorable Edmon L. Rinehart
Superintendent of Insurance

State of Alabama

C A P I T O L

Witnesses—Insurance—Costs and Fees—Subpoenas

1. There is no provision of law empowering the Superintendent of Insurance to pay witness fees and mileage costs to witnesses subpoenaed pursuant to provisions of Acts Nos. 530

and 598, General and Local Acts 1957, page 726 and 848 respectively.

2. Employee of Department of Insurance, at direction of Superintendent of Insurance, may serve subpoenas and subpoenas duces tecum issued pursuant to Act No. 598, supra, but cannot serve them under Act No. 530.

3. Affidavit not required for subpoenas issued pursuant to Acts Nos. 530 and 598, supra, when witnesses reside more than one hundred miles from the place of hearing.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of May 19, 1959 is as follows:

"A question has come up in connection with enforcement of the Insurance Laws under Acts No. 530 and 598, Alabama Law, Regular Session, 1957 approved September 13 and September 18, 1957.

"I direct your attention to Sections 10 and 11 of Act No. 530 and Section 14 of Act No. 598. You will see that the form and content of these applicable provisions of the two Acts differ in content. Both Acts give me the power of subpoena. However, Act No. 530 provides that the subpoena be issued by my office, directed to the sheriff of the appropriate county while Act No. 598 is silent on the subject.

"I have the following questions concerning the conduct of hearings pursuant to these Acts:

"1. Have I as Superintendent of Insurance the power under both of these Acts to pay mileage costs and witness fees to witnesses subpoenaed by me to attend hearings in connection with suspension or revocation of agents' licenses.

"2. Can a member of my staff at my direction, make valid service of subpoenas pursuant to these Acts.

"3. If a witness resides more than one hundred miles from the place of the hearing, must an affidavit that the witness's testimony is necessary be filed with the subpoena to entitle my office to compel his attendance at such hearings.

"I certify that answers to the above questions are necessary to the

proper conduct of the office of the Superintendent of Insurance of Alabama."

Section 10 (f) of Act No. 530, General and Local Acts 1957, page 726 is as follows:

"(f) The Superintendent shall have any power of subpoena, subpoena duces tecum or discovery obtaining in the Circuit Courts of this State, and any party shall have the right, upon request in writing filed with the Superintendent, to cause a writ of subpoena to issue out of the office of the Superintendent which shall be signed by the Superintendent or his deputy and directed to the sheriff of any County of this State returnable to the office of the Superintendent. The cost of issuing and serving subpoenas and witness fees shall be the same as such costs and fees in the Circuit Court and shall be recoverable by the prevailing party from the other party. The Superintendent shall tax such costs and upon the same not being paid within a period of 10 days therefrom, payment thereof may be endorsed (sic) in any court having jurisdiction over the person of the defaulting party."

Section 11 of Act, 530, General and Local Acts 1957, page 726 reads:

"Section 11—Complaint by Superintendent

"(a) The Superintendent may institute a proceeding to revoke or suspend the license of a licensee by filing a complaint against such licensee which complaint need not be sworn to but which shall be served upon the licensee as provided in Section 10 of this Act, and the Superintendent shall likewise notify all interested parties whom the licensee is licensed to represent. Thereupon, the proceeding shall be in all respects as provided in Section 10 of this Act.

"(b) No licensee whose license has been revoked or suspended, as provided by this Act, shall hold himself out as or claim to be such insurance agent, solicitor, broker, managing general agent or service representative."

Act No. 598, General and Local Acts 1957, page 848 contains the following:

"14B. Before any license shall be suspended or revoked or the renewal thereof refused hereunder, the Superintendent shall give notice of his intention so to do by registered mail to the applicant for or holder of such license and the insurer whom he represents or who desires that he be licensed, and shall set a date not less than twenty (20) days from the date of mailing such notice when the applicant or licensee and a duly authorized representative of the insurer may appear to be heard and produce evidence. In the conduct of such hearing, the Superinten-

dent, or any deputy specially designated by him for such purpose, shall have power to administer oaths, to require the production of books, records, documents, or papers relevant to the inquiry upon his own initiative or upon the request of the applicant or licensee. Upon termination of such hearing, findings shall be reduced to writing, and upon approval by the Superintendent, shall be filed in his office and notice of the findings sent by registered mail to the applicant or licensee and the insurer concerned.

"Section 18. Investigations by Superintendent; Evidence Adducted is Privileged. For the purpose of making such investigations as he may deem necessary for the proper administration of this Act, the Superintendent and his deputies specially designated by him for the purpose of conducting a hearing or investigation shall have inquisitorial powers and shall be empowered to subpoena witnesses and documents and to examine them under oath; provided that all testimony, documents and other evidence required to be submitted to the Superintendent pursuant to this Act shall be privileged and shall not be admissible as evidence in any other proceeding."

Your first question is:

"1. Have I as Superintendent of Insurance the power under both of these Acts to pay mileage costs and witness fees to witnesses subpoenaed by me to attend hearings in connection with suspension or revocation of agents' licenses?"

Act No. 530, Section 10(f), *supra*, authorizes assessment of mileage costs and witness fees for hearings under Section 10 and you are empowered, in my opinion, to assess such mileage costs and witness fees but not to pay them. This section has to do with a complaint and hearing before the Superintendent of Insurance or a designated deputy involving any person having an interest and feeling aggrieved who files a complaint against any licensed agent, solicitor, broker, managing general agent or service representative for the purpose of revocation or suspension of his license. In such a hearing costs are recoverable by the prevailing party. At a hearing under Section 11(a), however, there is no provision made for payment of costs. Under Section 11(a) the Superintendent of Insurance is the one instituting the proceeding to have the hearing on revocation or suspension of license. Under this Section there cannot be an assessment of costs.

Act No. 598, General and Local Acts 1957, page 848 makes no provision for payment of mileage costs and witness fees.

Where an act provides for issuance of a subpoena by a state official, but provides no authorization for payment of witness fees or mileage in such case, no fees or mileage are collectible by such witness. Quarterly Report of Attorney General, Volume 70, page 29.

My answer to your first question is in the negative as to Act No. 530, and also in the negative as to Act No. 598, which contains no provision of law for either assessment or payment of such mileage costs and witness fees to witnesses subpoenaed by you.

Your second question reads as follows:

"2. Can a member of my staff, at my direction, make valid service of subpoenas pursuant to these Acts."

My answer to your second question is that service of both subpoenas and subpoenas duces tecum must be by the sheriff under Act No. 530, supra, but under the inquisitorial powers granted to the superintendent and his specially designated deputies by Act No. 598, supra, members of your staff may make valid service of subpoenas and subpoenas duces tecum.

Your third question is as follows:

"3. If a witness resides more than one hundred miles from the place of the hearing, must an affidavit that the witness's testimony is necessary be filed with the subpoena to entitle my office to compel his attendance at such hearing."

Neither Act No. 530 nor Act No. 598, supra, provides for such a contingency.

Therefore, my answer to the third question is in the negative as to both acts.

Yours very truly,

MacDONALD GALLION

Attorney General

July 29, 1959

Honorable Floyd H. Mann

Director

Department of Public Safety

C A P I T O L

Public Safety Department—Records.

Director of Public Safety with the advice and consent of the Director of the Department of Archives and History has the discretionary authority to destroy any records which have no significance, importance or value.

Opinion by Assistant Attorney General Proctor.

Dear Sir:

I have your request for an official opinion bearing date of July 10, 1959, which is as follows:

"With reference to our telephone conversation, the information requested is to how long, if any time is required, this Department would have to keep the blue copy of the arrest tickets of arrests made by Officers of this Department? We have a number of records dating back for a number of years which have already been cleared by audit and we wondered if we could destroy these records after they have been kept for a period of 3 to 5 years.

"This blue copy of the ticket is the copy the Judge signs, stating the amount of fine and cost due the State. There is a ledger kept in addition to these tickets reflecting this information with the exception of the make, model and license number of the automobile the subject was driving."

Section 3 of Act No. 293, General Acts 1945, page 486 (Title 55, Section 289(8), 1955 Cumulative Pocket Part, Code of Alabama 1940), provides as follows:

"Section 3. DESTRUCTION OR DISPOSAL OF PUBLIC RECORDS REGULATED.—Any public records, books, papers, newspapers, files, printed books, manuscripts or other public records which have no significance, importance, or value, may, upon the advice and recommendation of the custodian thereof and upon the further advice, recommendation and consent of the Director of the Alabama State Department of Archives and History be destroyed or otherwise disposed

of. The Department of Archives and History is hereby authorized and empowered to make such orders, rules, and regulations as may be necessary or proper to carry the provisions of this section into effect."

In a former opinion this office held that the above-quoted act gives to the custodian of any public records, acting upon the advice and consent of the Director of the Department of Archives and History, the discretionary authority to destroy any records which he feels has no significance, importance or value. (See Quarterly Report of Attorney General, Vol. 77, page 19.) Whether these arrest tickets after audit have any further significance, importance or value is an administrative determination which you as custodian must make.

Therefore, it is my opinion that the records you speak of may be destroyed, provided you, as custodian, and the Director of the Alabama State Department of Archives and History concur that they no longer have any significance, importance or value.

Very truly yours,

MacDONALD GALLION

Attorney General

August 13, 1959

Honorable T. R. Ward

Probate Judge

Henry County

Abbeville, Alabama

Licenses—Tourist Camps—Hotels and Inns.

Persons who offer for rent rooms in their homes to overnight transient guests are not subject to the license imposed by Section 604 of Title 51, Code of Alabama 1940, on tourist camps.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of April 20, 1959, is as follows:

"We have in our County several people who have rooms for rent in their homes to transient guest. Some have one room with one bed. Some have two, three or four rooms. These are rented overnight or for more than one night at a daily rate. These people have not in the past paid any license and were under the impression that they were not due to pay any license. However, recently an agent of the revenue department has cited these people, or some of them, for a license under Section 604 of the code as a tourist camp. The minimum license under this section is \$23.00. These homes cannot qualify as hotels under Section 540 as they have less than 5 rooms. However, if one of them has 5 rooms it can qualify as a hotel and get their license for \$4.25 or a saving of \$18.75 on the amount for which they have been cited. It seems most unfair for a person with five rooms to get his license for less than one-fourth the amount paid by a person with 4 rooms to rent.

"Will you please give me your official opinion as to whether people with less than 5 rooms in their homes to rent to transient guest are required to pay a license and if so what license."

My answer to your inquiry is in the negative.

Section 604 of Title 51, Code of Alabama 1940, reads as follows:

"§ 604. Tourist camps.—Each person operating a public tourist camp, where transient guests are lodged for pay shall be deemed for the purpose of this section engaged in the business of keeping or operating a tourist camp and shall pay the following license or privilege tax: Each camp containing not over five beds, fifteen dollars; each camp containing over five, and not exceeding fifteen beds, twenty-five dollars; each camp containing over fifteen beds, thirty-five dollars and one dollar for each additional bed over fifteen."

This section has as its origin Schedule 142 of Section 348 of the Revenue Act of 1935. (Act No. 194, General Acts 1935, page 256.) In 1935 tourist camps had a definite and well understood meaning. The common accepted meaning of the term was and is what the words themselves imply, namely, a camp composed of several small cottages or one bedroom houses usually built around a centrally located office. This section of the code is defining one thing and one thing only—tourist camps. It is defined as a camp where transient guests are lodged for pay. It is to be specifically noted that the license or privilege tax is based on the number of beds contained in the camp.

It is interesting to note that the license imposed on innkeepers and hotels by Section 540 of Title 51, Code of Alabama 1940, is based on the number of rooms and imposes no license whatsoever on a person who rents rooms to transient guests in a house with less than five rooms. No men-

tion is made in this section as to the number of beds in the establishment as does Section 604, supra.

It now becomes necessary to determine just what the persons mentioned in your request are operating. Certainly it is not a tourist camp. The house has no relation to a tourist camp as that term is used in Section 604, supra. This for the reason that the establishments are the actual residences of the operators and they and their families make their home there. It is not an inn or hotel for the reason that the persons operating the establishments have less than five rooms which they offer to rent to the travelling public. I must conclude the establishments operated by the persons mentioned in your request fall within the well defined and established institutions known as tourist homes.

Tourist homes are defined in the case of *Woods v. Polino*, 86 F. Supp. 650, as follows:

"... Tourist homes are established institutions in America, and it is well known that in such places the family customarily live in the house and devote only a part thereof to the purpose of entertaining transient guests. It is difficult to see how a tourist home could be operated on any other basis."

I am unable to find any license or privilege tax imposed on a person operating a tourist home with less than five rooms. You are, therefore, advised that the persons mentioned in your request are not subject to any license.

Yours very truly,

MacDONALD GALLION

Attorney General

August 17, 1959

Honorable C. Delle D. Cobb

Register

Circuit Court of Chilton County

Clanton, Alabama

Registers—Costs and Fees—Appeals—Transcripts.

1. It is the duty and responsibility of the Register in Chancery to prepare the transcript for appeal when requested to do so by an aggrieved party to a suit.
2. A Register in Chancery may agree to the preparation of the transcript on appeal by the Court Reporter, or others, provided such transcript is properly prepared, the Register charges no fee therefor and, provided further, that the Register certifies the transcript as true and correct.
3. If the Register in Chancery enters into such an agreement with respect to the preparation of the transcript of testimony, such officer would then only be entitled to the fees provided by law for the preparation of that portion of the record other than the transcript of the testimony included therein.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of May 16, 1959, is as follows:

"Frequently the appellant orders a transcript of the evidence in an Equity case directly from the Court Reporter and the evidence or testimony is then transcribed on regular transcript paper and in the requisite number of copies to be inserted in the record for filing in the Supreme Court of Alabama. Of course the Register then transcribes the record proper and simply inserts the transcript of the testimony already prepared by the Court Reporter.

"It has been the custom in this office for several years for the Register, in such cases, to charge the litigants only for that part of the transcript actually prepared by the Register. In addition, a charge of \$10.00 has been made for checking and including such transcript in the record.

"Question has now been raised and I have been unable to find in Title 11, Section 27, specific authority for the procedure now being followed in my office. I might state that the auditor has never questioned it.

"I do find, however, authority in Title 11, Section 21, for an analogous fee to be charged by Clerks. I have also studied the Attorney General's Quarterly Reports, Volume 60, page 63, and Volume 79, pages 37-42, but I am unable to determine a definite answer to my problem.

"Therefore, will your office kindly give me an opinion on the following problems?

"1. To what fees is a Register entitled for preparing a transcript and record in an appeal to the Supreme Court of Alabama when the appellant furnishes to the Register the requisite number of copies of a transcript of the testimony prepared on transcript paper, and all the Register does with respect to that testimony is insert same in the record and check it, assuming that the case involved was originally docketed prior to the effective date of the amendment of 1957 to Title 11, Section 27, Code of Alabama?

"2. Please answer the same question assuming the case to have been originally docketed since the effective date of the amendment of 1957 to Title 11, Section 27, Code of Alabama."

Before giving answer to your specific questions I choose to advert briefly to a discussion of the procedure which you advise is now being followed by your office with reference to the preparation of transcripts on appeal in equity cases. You advise that frequently the appellant orders a transcript of the evidence in such cases directly from the Court Reporter who transcribes such testimony on regular transcript paper in the requisite number of copies to be inserted in the record for filing in the Supreme Court. You advise that the Register then merely transcribes the record proper in such case and inserts the transcript of the testimony prepared by the Court Reporter in order to complete the record. You further advise that in such cases the Register has charged the litigants only for that part of the transcript actually prepared by the Register and, in addition, a charge of \$10.00 for checking and including such transcript of testimony in the record.

Reviewing certain former opinions of this office, I find that such a procedure has been approved subject to certain conditions and limitations. In Quarterly Report of Attorney General, Volume 60, page 63, it is pointed out that in appeals in equity cases it is the duty of the Register to prepare the transcript for appeal when requested to do so by an aggrieved party to a suit, citing Title 13, Section 215, Code of Alabama 1940, and Title 7, Section 768, Code of Alabama 1940. However, such opinion continues, if

both parties agree to arranging for the preparation of the transcript by someone other than the Register and the Register does not charge a fee therefor, there is no reason why such procedure should be prohibited. The transcript must be properly arranged and certified by the Register as required by Supreme Court Rule 26, Appendix; Title 7, Code of Alabama 1940.

The reasoning of such opinion is further borne out in a later opinion found in Quarterly Report of Attorney General, Volume 70, page 32. Here again, it is pointed out that it is the duty of the Register to prepare the transcript for appeal, citing the authorities set out above. This official is entitled to charge a fee for the preparation of such transcript. When oral testimony is taken in such cases and transcribed in typewriting by the Court Reporter and filed in the cause, it becomes a part of the record of the proceedings, and the Register may charge a fee for copying such testimony on transcript paper as a part of the transcript on appeal. This does not, of course, prohibit the parties from agreeing that the transcript may be prepared on transcript paper by the Court Reporter or some other person, provided that the Register does not also charge a fee for doing the same task, and provided that the transcript is properly arranged and is certified by the Register. Such an agreement would, of course, have to be made with the consent of the Register since this official is the one charged with the duty of preparing the transcript. Like reasoning is found in even greater detail in an opinion found in Quarterly Report of Attorney General, Volume 79, page 37.

From all of the above I am of the opinion that the procedure mentioned by you in your request is authorized provided such is approved by all of the parties concerned, these being the Court Reporter, the appellant and yourself. The Court Reporter would, of course, have to agree to do the work and perform the services normally required of you. The appellant would be the person charged with making such arrangements with the Court Reporter as to secure the transcript required in proper form and sufficient number of copies and, lastly, such would have to be done with your consent for, by law, you are the one charged with the preparation of such transcript and without your agreement the Court Reporter would not be permitted to perform this service. As mentioned above, in either event, you would be required to see that the transcript is properly arranged and certify to same.

Turning next to your question concerning the fees to which you would be entitled as Register under such an arrangement, I would advise that you would only be entitled to receive the fee provided by law for properly transcribing that portion of the transcript actually prepared by you. Under the situation outlined in your request this would include only the record proper and would not include the transcript of the testimony in the case, I find no provision of law allowing you a ten-dollar fee, or a fee in any amount, for checking such transcript of testimony and including same in the record. Your uncertainty in this regard is perhaps occasioned by the

fact that Clerks of the Circuit Court do receive a fee in this amount for checking and including transcript of testimony in records on appeal in civil cases. Such has been the case with these officers since the passage of Act No. 375, General Acts of 1947, page 264, and such provision is carried forward in Act No. 740, Acts of 1957, page 1169. However, as I have noted, no such fee is applicable to the Register for similar services in appeals taken from the Equity Court.

You have asked that I advise you as to the fee to which you would be entitled both in cases docketed prior to January 20, 1959 and subsequent thereto. Prior to such date the fees of Registers were provided for by Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts of 1947, page 262. Under the schedule of fees then applicable you were entitled to receive a fee of fifteen cents for each one hundred words contained in the portion of the record prepared by you and five cents for each one hundred words contained in each additional copy of such transcript prepared by you. I state again that this fee would apply only to the portion of the transcript prepared by you and, in the event the transcript of the evidence was prepared by the Court Reporter with your consent, you would receive no fee for such preparation.

Since January 20, 1959 the provisions of Act No. 742, Acts of 1957, page 1171, as they amend Title 11, Section 27, *supra*, have application to the fees allowed Registers. Opinion to Honorable N. Henry Byrd, Circuit Clerk and Register, Dale County, Alabama, dated January 22, 1959. Under the provisions of this latter act you are allowed a fee of twenty cents for each one hundred words contained in any transcript prepared by you. No mention is made in such act of any fee allowed for copies of such transcript. However, in an opinion of this office rendered to Honorable Robert Newman, Jr., the then President of the Alabama Association of Circuit Court Clerks and Registers, under date of January 16, 1959, it was pointed out that a Register, in preparing a transcript on appeal, would be entitled to the twenty cents per one hundred words provided for by Act No. 742, *supra*, and, in addition thereto, five cents per one hundred words for each copy of the transcript going to the appellant and the appellee, this fee provided for the copies concerned being authorized by Title 7, Section 768 of the Code of Alabama 1940. Accordingly, under the reasoning of this latter opinion, since January 20, 1959, you would be entitled in cases docketed since that date to a fee of twenty cents for each one hundred words contained in the portion of the transcript prepared by you and an additional fee of five cents for each one hundred words contained in the copies of such transcript furnished the appellant and appellee.

Very truly yours,

MacDONALD GALLION

Attorney General

August 17, 1959

Honorable C. C. (Jack) Owen

President

Alabama Public Service Commission

C A P I T O L

Carriers—Public Service Commission—Words and Phrases.

1. Dried peas and beans are "agricultural commodities" and not "manufactured products thereof" within the meaning of Section 301(2) A(3) of the Alabama Motor Carrier Act of 1939. (Title 48, Section 301(1) et seq., 1955 Cumulative Pocket Part, Code of Alabama 1940.)
2. Where a commodity retains a continuing substantial identity through the processing stage, it cannot be said to be manufactured within the meaning of Section 301(2) A(3) of the Alabama Motor Carrier Act of 1939.
3. The transportation of dried peas and beans by motor vehicle in Alabama is exempt from the operation of the Alabama Motor Carrier Act of 1939.

Opinion by Assistant Attorney General Proctor.

Dear Sir:

Your request for an official opinion bearing date of August 6, 1959, is as follows:

"Section 301(2) of Title 48 of the Code of Alabama of 1940, provides certain exemptions from the provisions of the Alabama Motor Carrier Act of 1939 which are contained in the Code of Alabama commencing with Section 301(1) of Title 48. Among other exemptions it is provided that the Act shall not be construed to apply to motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales, cottonseed, fertilizer, peanuts, potatoes, or any other agricultural commodity of any kind (but not manufactured products thereof).

"We have received inquiry from a party who is interested in the transportation of dried peas and beans in one and two pound bags by truck.

"I will appreciate your official opinion as to whether or not the transportation of dried peas and dried beans by motor vehicle in Alabama is exempt from the operation of Alabama Motor Carrier Act of 1939.

"If we may be helpful in determining this matter, please call upon us."

I am of the opinion that the transportation of dried peas and dried beans by motor vehicle in Alabama is exempt from the operation of the Alabama Motor Carrier Act of 1939. (Title 48, Section 301(1) et seq., 1955 Cumulative Pocket Part, Code of Alabama 1940.) •

Section 301(2) A(3) of the Alabama Motor Carrier Act of 1939, as amended, provides that the act shall not be construed to apply to:

"Motor vehicles while used in the transportation of property when the owner of the vehicle is legally and regularly engaged in the business of selling such property and is the owner and has the legal title to the motor vehicle involved; also motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales, cottonseed, fertilizer, peanuts, potatoes, or any other agricultural commodity of any kind (but not manufactured products thereof) . . ."

Your inquiry, therefore, raises the question of whether peas and beans become a manufactured product by reason of their having been subjected to a drying process. Part II of the Interstate Commerce Act, as amended, found in 49 United States Code Annotated, Section 301, et seq., has a provision similar to that portion of the Alabama Motor Carrier Act under consideration. Subsection (b) of Section 303, Title 49, United States Code Annotated, reads, in pertinent part, as follows:

"(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: . . ."

In defining just when a product becomes "manufactured," the Supreme Court of the United States in *Anheuser-Busch Brewing Association v. United States*, 207 U. S. 556, 28 S. Ct. 204, 52 L. Ed. 336, said the following:

" . . . Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240. There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'"

And further:

"At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of § 203(b) (6)."

•

In interpreting the above-quoted portion of the Interstate Commerce Act, it has been held that dried beans, dried fruits, dried egg yolks, and dried egg powder are still "agricultural commodities" rather than "manufactured products thereof." See *Frozen Food Express v. United States*, 148 Fed. Supp. 399, affirmed 78 S. Ct. 38, 355 U. S. 6, 2 L. Ed. 722. Likewise, redried tobacco which was processed through expensive machinery has been held to be an "agricultural commodity" rather than "a manufactured product thereof." See *Interstate Commerce Commission v. Yeary Transfer Company*, 104 Fed. Supp. 245.

As peas and beans do not lose their substantial identity after having been submitted to a drying process, the dried peas and beans must still be considered as agricultural commodities rather than as manufactured products thereof.

Therefore, premises considered, it is my opinion that the transportation of dried peas and beans by motor vehicle in Alabama is exempt from operation of the Alabama Motor Carrier Act of 1939.

Yours very truly,

MacDONALD GALLION

Attorney General

August 18, 1959

Hon. Ralph P. Eagerton

Chief Examiner

Department of Examiners of Public Accounts

State of Alabama

Montgomery 4, Alabama

Convicts—Corrections and Institutions, Department of—
Highways and Highway Department—Road and Bridge Fund.

Cost of maintaining of convicts working on public roads under the direction of the Highway Department, such as guards and housing, is to be paid out of the Public Road and Bridge Fund.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of August 7, 1959, is as follows:

"In the course of a current audit of the State Highway Department certain matters have arisen necessitating an official opinion of your office.

"During such audit the Examiner has called to my attention the provisions of Title 23, Section 31, Code of Alabama 1940, pertaining to the use of state convicts in the construction and maintenance of the public roads and bridges of the State. This statute, as I understand it, authorizes the use of such convicts but contains a proviso as follows:

" 'Provided that the charge for labor of such convicts, shall not exceed two dollars per day, and no other expense incurred by the use of such convicts shall be chargeable to the highway department, except such necessary tools and implements used in the construction, repairing or maintaining of the public roads and bridges upon which the convicts are employed.'

"I find that during the 1957-1958 fiscal year, and perhaps during other periods, rather large sums have been expended from funds of the Highway Department for the employment of guards or supervisors used in connection with the work of such convict labor and also for the overhead and maintenance of camps or other housing facilities for such convict labor. In every instance brought to my attention, these latter charges and costs far exceed the actual amounts expended for the convict labor. Question has arisen as to whether or not this expense, incurred through the employment of guards and supervisors and the maintenance of camps and housing facilities, should be charged to the State Highway Department or to the State Board of Corrections. Such doubt arises by reason of that portion of the proviso quoted above to the effect that no other expense incurred by the use of such convicts shall be chargeable to the Highway Department, except such necessary tools and implements used in the construction, repairing or maintaining of the public roads and bridges upon which the convicts are employed.

"I respectfully request that your office review this matter and advise me as to whether or not the expenses mentioned above, other than that for prisoner hire, should be charged to the funds of the State Highway Department or to the State Board of Corrections. If

you should determine this to be a proper charge against the State Highway Department, please advise as to whether funds accruing to the State Highway Department restricted by Constitution and statute for use solely in the construction, maintenance or repair of public roads and bridges may be used to defray the expenses mentioned above.

"I enclose herewith certain figures extracted from the records of the State Highway Department which illustrate the situation discussed above."

Questions asked by you have previously been answered by this office in an opinion to the Chief Examiner dated April 23, 1929, Biennial Report of Attorney General, 1928-30, page 291.

In that opinion, construing the 1927 Act creating the Highway Department and, specifically, Section 37 of that Act, now Title 23, Section 31, Code of Alabama 1940, this office held, in effect, that the charge of maintaining convicts engaged in public road work was not technically a charge against the Highway Department or the Board of Corrections, but a charge against that portion of the Road and Bridge Fund set aside for the purpose as a secondary use after payment of bonds and interest under the control and for the use of the Highway Department.

I have reviewed the Act creating the present Road and Bridge Fund, Title 51, Section 656, Code of Alabama 1940, as amended, and I find essentially the same wording as that contained in the 1927 Fund discussed in the former opinion. Section 656, *supra*, provides, in part, as follows:

"... (c) One-ninth of said three-sevenths covered into the treasury to the credit of the public road and bridge fund under the provisions of this section (being one-twenty-first of the proceeds of the entire excise tax herein imposed), together with any residue of the tax proceeds referred to in subsections (a) and (b) of this section remaining after provisions shall have been made for the primary obligations referred to in said subsections (a) and (b), may be used by the highway department, with the approval of the governor, in constructing public roads and bridges within the state as now or may hereafter be provided by law, and in maintaining the public roads and bridges which have been or may hereafter be constructed by the highway department, in equipping and preparing convicts for use upon the public roads and bridges of this state, for maintenance of such convicts while so at work upon such roads and bridges, for compensating the state for the use of such convicts, and for such other use upon the public roads and bridges of this state as may be authorized by the highway department with the approval of the governor. Provided, however, that the moneys referred to in this subsection (c) shall not

be expended contrary to law as it now exists or may be hereafter enacted." (Emphasis supplied.)

This Act appropriates to the use of the Highway Department certain funds for the maintenance of the road convicts which is tantamount to a public fund under the control of the Highway Department.

The logical inference from Title 23, Section 31, quoted by you in your letter, is that the Legislature of Alabama contemplated merely relieving the General Fund and other Highway funds of the burden of maintaining convicts while at work on the public roads and bridges and of equipping such convicts.

In my opinion, therefore, the interpretation previously rendered by this office is a correct statement of the law and is accordingly reaffirmed. This conclusion is further strengthened by the fact that Section 656, *supra*, is the latest expression of the Legislature on this subject. It is further my opinion that guards and housing are an integral part of the maintenance of convicts used in the road work, as contemplated by Section 656, *supra*.

Very truly yours,

MacDONALD GALLION
Attorney General

August 18, 1959

Hon. C. C. Horton

Director

Department of Veterans Affairs

P. O. Box 1509

Montgomery 2, Alabama

Veterans—Officers and Offices.

Under Act No. 173, General Acts 1945, page 304 (Title 60, Chapter 4, Sections 53-66, Code of Alabama 1940, 1955 Cumulative Pocket Part) the State Board of Veterans Affairs has authority to grant representation on said Board to any organization

of veterans of the second World War, having a national charter authorized by an Act of Congress and operating through local organizations in Alabama. When such representation is granted, the term of office of such a member begins as of October 1, 1945, or any fourth year subsequent thereto, and is for four years. There is no authority for the revocation of any appointment so made.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of August 6, 1959, is as follows:

"At the direction of members of the State Board of Veterans Affairs, I am instructed to request your opinion in regard to the following matter.

"Under provisions of the Act creating the Department of Veterans Affairs as shown in Chapter 4, Title 60, of the Code of Alabama, a method is prescribed whereby organizations are granted representation on the State Board of Veterans Affairs. I respectfully invite your attention to the phrasing contained in Section 55 of the cited chapter as excerpted and quoted here: "The said board shall have authority to grant representation thereon, and on the same basis of membership as hereinabove, to any organization of veterans of the second World War having a national charter authorized by an act of congress and operating through local organizations in Alabama."

"The question concerning which we request your opinion is whether or not this power to grant representation on the State Board carries with it a power to revoke any representation so granted.

"There were of course a number of organizations of veterans of World War II created following the close of that conflict and many were chartered by Congress and some had local organizations in this state. The life of many was short and the 'local organizations' are frequently only vestigial.

"The concern of the State Board can readily be understood over the power of granting representation to organizations such as these unless there is equally a power of revocation when circumstances justify such an action."

Act No. 173, approved July 23, 1945, General Acts 1945, page 304 (Title 60, Chapter 4, Sections 53-66, Code of Alabama 1940, 1955 Cumulative

Pocket Part) created a State Department of Veterans Affairs. Section III of said Act, which appears as Title 60, Section 55, Code of Alabama 1940, 1955 Cumulative Pocket Part, provides in part as follows:

"Composition, Terms and Duties of Board.—The State Board of Veterans Affairs shall consist of the Governor, as Chairman, and representatives to serve for a term of four years from the date of their respective appointments, who shall be selected from the memberships of the Alabama Department of The American Legion, the United Spanish American War Veterans, the Veterans of Foreign Wars, and the disabled American Veterans, the nomination of such representatives to be made by the Executive Committees of (sic) similar governing bodies of the respective organizations on the following ratio of said membership as existing on July 1st of the year in which they shall be appointed, said appointment to be made by the Governor to-wit: There shall be one representative from each of said organizations for the first 7500 resident members or fraction thereof, and one additional representative from each such organization for each additional 7500 resident members or fraction thereof, the total memberships of the respective organizations to be determined as of July 1st of the year in which such representatives shall be designated from the State enrollment of such organization, duly verified as correct by the Adjutant or similar officer of said organization, provided that the Executive Committees or similar governing bodies of the above named organizations shall each nominate to the Governor three veterans who are members of such organizations, for each place on the Board to which said organizations are entitled; provided further that said nominations shall include in representative proportions veterans of every war which are included in the membership of said organizations. The said Board shall have authority to grant representation thereon, and on the same basis of membership as hereinabove, to any organization of veterans of the second World War having a national charter authorized by an Act of Congress and operating through local organizations in Alabama."

In an opinion of this office rendered Lawrence A. May, First Assistant State Service Commissioner, Department of Veterans' Affairs, dated April 22, 1946 (Quarterly Report of Attorney General, Vol. 43, page 31) it was held that the original members of the State Board were appointed as of October 1, 1945 for a term of four years expiring as of September 30, 1949, and that new appointments should be made as of October 1 each four years thereafter, except to fill an unexpired term, the number of representatives from each organization to be determined according to the total membership of that organization as existing on July 1 of the year in which the new appointments are to be made upon the expiration of the four year term of the Board then in existence.

The Board has permissive authority to grant representation to any organization of veterans of the second World War, having a national

charter authorized by an Act of Congress and operating through local organizations in Alabama, on the same basis of membership as the organizations specifically named in the above quoted portion of Section III, *supra*. In my opinion, when such representation is granted, the term of office of such a member begins as of October 1, 1945 or any fourth year subsequent thereto, and is for four years. The number of representatives to be appointed is determined according to the membership of that organization existing on July 1 preceding the October 1 on which the appointment is made. I find no authority authorizing the revocation of any appointment so made. Where a fixed term is assigned to an office, an appointing authority has no absolute power of removal.—Quarterly Report of Attorney General, Vol. 23, page 173. Moreover, in the instant case the Governor is the appointing authority and not the Board.

From the foregoing it follows that the present appointments representing World War II organizations, as above defined, should have been made as of October 1, 1957, based upon the membership of each of such organizations on July 1, 1957, for a term of four years expiring September 30, 1961. These appointments so made are not subject to revocation.

However, as above pointed out, a grant of representation to such World War II organizations is permissive only. They need not be renewed each four years unless the grant of representation is made by the Board. In other words, the Board does not have to grant representation to such an organization for the new term beginning October 1, 1961, even though it may have had representation for a preceding term or terms.

Very truly yours,

MacDONALD GALLION

Attorney General

August 25, 1959

Honorable Homer McLemore, Chairman

Board of Revenue

Limestone County

Athens, Alabama

Costs and Fees—Sheriffs—Courts

1. A sheriff is now entitled to a fee of \$6.00 per day for each day's attendance upon the circuit or county court, as provided by Act No. 571, Acts of 1955, page 1243.

2. The attendance fee of \$6.00 became applicable with the commencement of the term of office beginning January 20, 1959.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of May 8, 1959 is as follows:

"The incumbent sheriff of Limestone County began a new term of office in January 1959.

"Please refer to Act No. 571, approved September 9, 1955, Acts of Alabama, Regular and Special Sessions 1955, volume II, page 1243 and note that this act amends Section 34 and 100 of Title 11, Code of Alabama, 1940, relating to fees and allowances of sheriffs.

"Section 34 of Title 11 is the civil section and Section 100 of Title 11 is the criminal section, both presumably being applicable to the circuit court.

"Section 2 of this act, amending section 100 of Title 11 contains the following:

"For attendance each day on the circuit or county court, to be paid by the county. \$6.00

"Section 100 of Title 11, before the above amendment was enacted contained the following:

"For attendance each day on such court to be paid by the county \$2.00

"Section 87 of Title 11, relating to fees in county court of both the clerk and the sheriff, contains the following:

"For each day's attendance by the sheriff on such court \$2.00

"Act No. 741, approved September 23, 1957, Acts of Alabama, Regular Session 1957, Volume 11, page 1170, relates to fees for the circuit court clerks and the ex-officio clerks of the county courts and clerks of the law and equity courts, with no mention of sheriff fees.

"Section 2 of this act reads:

"The provisions of Section 87 of Title 11, Code of Alabama, 1940 and all

laws and parts of laws, general, special or local, in conflict with this act are hereby repealed.

"The fees enumerated in this act, being clerk fees only, are brought forward in the Code of 1940 as Section 89 (2) of Title 11.

"Your opinion is respectfully requested in answer to the following questions:

"1. Does the addition of the words 'or county court' as contained in Section 2 of Act No. 571, September 9, 1955, providing for the sheriff's attendance fee of \$6.00, repeal the fee of \$2.00 as provided for in Section 87 of Title 11?

"2. Does Act No. 741, September 23, 1957, repeal the \$2.00 attendance fee of the sheriff in county court as provided for in Section 87 of Title 11?

"3. Specifically what fee should the county pay the sheriff for each day's attendance upon the county court?

"4. If you hold that the sheriff is entitled to \$6.00 for each day's attendance upon the county court, would such claim be retroactive to September 9, 1955, and would the sheriff's claim for \$4.00 per day additional be legal, and should such additional claim be legally paid by the county?"

I am of the opinion that the sheriff of your county would now be entitled to a fee of six dollars (\$6.00) per day for each day's attendance upon the county court. As you have pointed out in your request, Act No. 571, General and Local Acts of 1955, page 1243, amended Sections 34 and 100 of Title 11 of the Code of Alabama 1940, which relates to the fees and allowances of sheriffs. Section 2 of said act, amending Section 100 of Title 11, *supra*, reads in part as follows:

"For attendance each day on the circuit or county court, to be paid by the county \$6.00"

The provisions of this act, in my opinion, supersede that part of Title 11, Section 87, Code of Alabama 1940, providing for a two-dollar (\$2.00) fee for each day's attendance by the sheriff on the county court.

In your request you make some mention of Act No. 741, Acts of 1957, page 1170, an act relating to the costs and fees of those circuit clerks serving as ex-officio clerk of an inferior court. The provisions of Act No. 741, *supra*, relate solely to the costs and fees of the officer named, the circuit clerk, and have no relation whatsoever to the costs and fees applicable to

the sheriff. The provisions of such act have no application whatsoever to the questions presented by you in your request. However, as I have pointed out, the provisions of Title 11, Section 87, supra, as they relate to the fee provided the sheriff for attendance upon the county court, have now been superseded by Act No. 571, supra.

In your request you also inquire as to whether or not any claim the sheriff might have for this increase in fees would be retroactive to the date of its approval by the Governor, September 9, 1955, and whether or not the sheriff would be permitted to make claim for the additional amount allowed him by Act No. 571, supra.

Answer to this question is founded upon the fact that the increased fee allowed the sheriff for court attendance did not become effective until the beginning of the current term of office commencing January 20, 1959. Prior to such date the fee to which the sheriff was entitled for attendance upon the county court was based upon the provisions of Title 11, Section 87, supra, and was in the amount of two dollars (\$2.00). Beginning with the new term of office commencing January 20, 1959, the sheriff was entitled to receive the fee allowed him by Act No. 571, supra, in the amount of six dollars (\$6.00) for each day's attendance upon such court. This is pointed out in a former opinion of this office found in Quarterly Report of Attorney General, Volume 81, page 43. Consequently, the sheriff of your county would only be entitled to receive the fee of six dollars (\$6.00) per day for each day's attendance commencing with his present term of office.

Very truly yours,

MacDONALD GALLION

Attorney General

August 26, 1959

Honorable J. H. Curry

Curry & Kirksey

County Attorneys

Carrollton, Alabama

Counties—Gasoline and Gasoline Tax—Highways and Highway
Department—Loans.

Where State owes to county moneys advanced by county in

payment of highway project estimates under contract executed pursuant to Farm to Market Road Act, if necessary to pay future estimates, county may procure temporary loan from local bank, pledging as security therefor an assignment of county's claim against State for funds due to be reimbursed to county for said project.

Opinion by Assistant Attorney General Mentz.

Dear Sir:

Your request for an official opinion dated March 30, 1959, is as follows: "The Court of County Commissioners of Pickens County, Alabama, would like to have your opinion on the following proposition.

"Pickens County has advanced on behalf of the State Highway Department certain funds for the payment of estimates on highway construction on two highway projects in Pickens County. These projects are being built with SACP funds. The State Highway Department is obligated to repay to Pickens County one half of the funds paid on said estimates and the amount presently due to the County by the State is approximately \$75,000.00.

"The County is unable to meet claims for future estimates on these projects until some of the funds are reimbursed to Pickens County by the State.

The Highway Department has suggested to Pickens County that it borrow enough money from the local banks of this County to meet the present estimates and pledge to the banks an assignment of Pickens County's claim against the State for the funds that are due to be reimbursed for said projects.

"Please advise us if Pickens County can make such temporary loan or loans from the local banks to pay the future estimates and also if said claim against the State Highway Department can be assigned by Pickens County as security to the banks for such loan or loans.

"Since these projects are held up pending the obtaining of funds to pay future estimates, it will be greatly appreciated if you can give this matter your earliest attention."

I assume that the highways which are the subject of your inquiry are being constructed pursuant to Act No. 329, General Acts of Alabama 1943, page 311, captioned the "Farm to Market Road Act of 1943," as amended by Act No. 41, General Acts of Alabama 1945, page 47, Act No. 440, General Acts of Alabama 1947, page 319; Act No. 441, General Acts of Alabama

1947, page 321; Act No. 14, Acts of Alabama 1950, Fourth Special Session, page 55; Act No. 855, Acts of Alabama 1951, page 1484; and Act No. 831, Acts of Alabama 1953, page 1119.

Section 6 of Act No. 329, *supra*, as amended by Section 4 of Act No. 855, *supra*, relative to the payment of cost of construction of county roads, provides that any county may advance, from its own funds, the amount provided in its contract with the State to be contributed from the State County Aid Fund; and it also provides that any county may anticipate the moneys to be paid to it under the Act from the State County Aid Fund, or any of said moneys, to whatever extent the county may deem advantageous and to whatever extent such anticipation may be permitted by law. It further provides for the payment of moneys out of the State County Aid Fund equal in amount to one-half of the cost of the construction that has been completed and approved, to the county, or on the order of the county in the event the county shall have anticipated such moneys by the issuance of warrants of the county payable therefrom, as soon as moneys in the State County Fund may be available for such payment.

Act No. 856, Acts of Alabama 1951, page 1488, as amended by Act No. 830, Acts of Alabama 1953, page 1117, provides that a county which, pursuant to Act No. 329, as amended, *supra*, has entered into a contract with the State Highway Department through the Bureau of County Aid for the construction of one or more county roads and for the matching with moneys from the County Aid Fund of moneys of such county for construction of such road or roads, shall have the power to anticipate by the sale and issuance of its interest bearing warrants the receipt of moneys to be paid from the County Aid Fund, pursuant to such contract, to or on the order of such county. It further provides that the proceeds received by the county from the sale of any such warrants shall be applied, among other specified uses, for reimbursing the county to whatever extent the county shall, prior to the issuance of such warrants, have already paid or advanced moneys covering the State's contribution to the costs of constructing such county road or roads.

Under the provisions of Title 23, Section 43, Code of Alabama 1940, as amended by Act No. 729, Acts of Alabama 1953, page 984, the county governing bodies of the several counties are vested with broad powers in reference to public roads, bridges and ferries within their respective counties. Quarterly Report of Attorney General, Vol. 39, page 34. In a prior opinion, this office ruled that under authority of said statutory provision, a county governing body may procure from a banking company a sum of money to be used for the purchase of equipment for constructing and maintaining the public roads of the county, pledging as security therefor interest bearing warrants issued by the county payable exclusively from funds received by the county by virtue of Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts of Alabama 1943, page 20; Act No. 44, Acts of Alabama 1955, 1st Ex. Sess., page 73. Quarterly Report of Attorney General, Vol. 48, page 219. Our courts have also upheld

the issuance of interest bearing warrants, issued by a county for the purpose of constructing highways, and containing an express stipulation that said warrants were to be paid only out of the county's share of the gasoline fund and were not to operate as a charge against the county's general fund. *Lyon v. Shelby County*, 235 Ala. 69, 177 So. 306; *Herbert v. Perry*, 235 Ala. 71, 177 So. 561; *Isbell v. Shelby County*, 235 Ala. 571, 180 So. 567.

The security for such county warrants in anticipation of payments under Act No. 329, *supra*, is a portion of a State tax allocated by law to the counties; it does not in any respect tap an existing or potential resource of revenue of the counties, but is merely a donation of State funds. *Rollings v. Marshall County*, 263 Ala. 317, 82 So. 2d 428, 432.

Since a county governing body may anticipate by the sale and issuance of its interest bearing warrants the receipt of the moneys to be paid to the county from the State County Aid Fund, pursuant to its contract with the State under Act No. 329, as amended, *supra*, it seems logical to conclude that where, under said Act, the State and a county have entered into such a highway contract and the State is obligated to pay to the county a sum certain as a result of the county's having advanced on behalf of the State certain funds for the payment of estimates or the construction of the highway, and the county is unable to pay future estimates until it is paid some of the funds which are due to be paid to it by the State, the county governing body may procure by means of a temporary loan or loans from a bank or banks within the county enough money, not to exceed the amount then due to be paid by the county by the State under its highway contract, to pay necessary future highway construction estimates and pledge to the bank or banks an assignment of the county's claim against the State for the sum certain that the county is due to receive from the State under its highway contract.

Accordingly, it is my opinion that your inquiry should be answered in the affirmative.

Very truly yours,

MacDONALD GALLION

Attorney General

August 27, 1959

Hon. Floyd H. Mann

Director

Department of Public Safety

C A P I T O L

Municipalities—Public Safety Department—Police—Motor Vehicles.

1. The local Police Department has the duty to investigate certain motor vehicle accidents occurring on State-owned parking lots located within a municipality.
2. The Department of Public Safety may at its discretion investigate such accidents occurring on State-owned parking lots located within a municipality.

Opinion by Assistant Attorney General Proctor.

Dear Sir:

Your request for an official opinion bearing date of August 4, 1959, is as follows:

"I would like to request an official opinion as relates to the investigation of traffic accidents happening on State owned and operated parking lots. For example the parking lots around the Capitol.

"Is it the responsibility of the Highway Patrol or the City Police. If it is the responsibility of the Patrol, we would like to have the necessary authorization in the form of an opinion from your office."

Sections 6 and 7(c) of Act No. 558, General Acts of Alabama 1943, page 548, as amended by Act No. 126, Acts of Alabama 1951, page 354 (Title 36, Sections 116 through 128, 1955 Cumulative Pocket Parts, Code of Alabama 1940), provides as follows:

"Section 6. IMMEDIATE REPORTS OF ACCIDENTS. (a) The driver of any motor vehicle involved in an accident resulting in injury to or death of any person shall immediately by the quickest means of communication give notice of such accident to the local police department if such accident occurs within a municipality; otherwise to the office of the county sheriff or to the director of Public Safety. (b) Every coroner or other official performing like functions upon learning of the

death of a person in his jurisdiction as the result of a traffic accident shall immediately notify the nearest office of the director.

"Section 7. WRITTEN REPORTS OF ACCIDENTS. . . . (c) Every law enforcement officer who in the regular course of duty, investigates a motor vehicle accident of which report must be made as required in this section 7, either at the time of and at the scene of the accident or thereafter be interviewing participants or witnesses shall, within 24 hours after completing such investigation, forward a written report of such accident to the director."

These sections seem to clearly imply that the local Police Department has the duty to investigate such accidents occurring within municipality and either the county sheriff or the department of Public Safety, depending upon which is notified, has the duty to investigate accidents occurring outside the limits of a municipality. No exception is made for accidents occurring on State-owned property located within a municipality. Therefore, if the State-owned parking lots of which you speak are located within a municipality, the primary duty for investigating such accidents occurring on these parking lots lies with the local police.

This is not to say, however, that the Department of Public Safety does not also have the authority and power to investigate such accidents occurring within municipalities or on State-owned parking lots. Act No. 585, Acts of Alabama 1953, page 828 (Title 36, Section 58(54)-58(69), 1955 Cumulative Pocket Part, Code of Alabama 1940), provides, in pertinent part, as follows:

"Section 5. It shall be the duty of the Director of the Department of Public Safety, and he shall have power to do all that is necessary to administer and enforce, (1) all laws pertaining to the rules of the road contained in Title 36, Sections 1-58, Code of Alabama 1940, as the same may now or hereafter be amended, (2) all other laws contained in Title 36, Code of Alabama 1940, as the same may now or hereafter be amended, pertaining to the registration and licensing of drivers of motor vehicles, (3) all other laws contained in Title 36, Code of Alabama 1940, as the same may now or hereafter be amended, (4) the Motor Vehicle Safety Responsibility Act, as the same may now or hereafter be amended, (5) all other laws relating or pertaining to the operation or movement of vehicles on the public highways of this State, and (6) such other laws as the said Department has heretofore administered and enforced.

"Section 7. Members of the State Highway Patrol when duly appointed shall have the powers of Peace Officers in this State and may exercise such powers anywhere within the State."

As Sections 6 and 7(c) of Act No. 558 have been incorporated into Title

36, and as Section 7 of Act No. 585, supra, gives the Highway Patrol Officers the power of peace officers anywhere within the State, it is my opinion that the Director of Public Safety may, at his discretion, investigate such motor vehicle accidents occurring on State-owned parking lots whether the parking lots are located within a municipality or not

Yours very truly,

MacDONALD GALLION

Attorney General

August 31, 1959

Honorable M. S. Butler

Sheriff

Montgomery County

Montgomery, Alabama

Exemption—Attachments—Leases.

Title 7, Section 712, Code of Alabama 1940, applies to attachment suit on lease which contains waiver of exemption.

Opinion by Assistant Attorney General Tyson.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1959, is as follows:

"I am requesting an official opinion from your office in regard to Exemptions, particularly in Attachments for rent.

"Under Title 7, Section 712, Code of Alabama, 1940, certain pieces of household furniture are exempted from levy of an Execution or an Attachment, although there has been a 'Waiver' of exemption.

"Will you be kind enough to advise me whether an Attachment for Rent comes under this Section or not.

Title 7, Section 712, Code of Alabama 1940, reads as follows:

"Section 712. EXCEPTION TO WAIVER.—No waiver of exemption in any written instrument shall be held to apply to or include or authorize the levy of an execution or attachment on any of the following property—cooking utensils, cooking stoves, table, tableware, chairs, bed and bed clothing in actual use by the family, wearing apparel, meat not exceeding one hundred pounds, lard not exceeding fifty pounds, meal and flour not exceeding ten bushels, or if no meal or flour, corn or wheat not exceeding ten bushels, ten bushels of Irish or sweet potatoes, ten gallons of syrup, and one cow and calf to be selected by the debtor, for any debt contracted, and any levy upon such property is absolutely void."

Title 31, Section 29, Code of Alabama 1940, in part, reads as follows:

"Section 29. LIEN DECLARED.—The landlord of any storehouse, dwelling house, or other building, shall have a lien on the goods, furniture and effects belonging to the tenant, and subtenant, for his rent, which shall be superior to all other liens, except those for taxes."

The several chapters, titles and sections of the 1940 Code are in *pari materia*, each having a field of operation, and must be so construed. *Jenkins v. State*, 16 So. 2d 314, 245 Ala. 159. Also *Jefferson County v. City of Birmingham*, 221 Ala. 476, 129 So. 48.

Judicial interpretation of statutes brought forward in codes without change become part of statutes by legislative adoption. *Hurt v. Knox*, 126 So. 110, 220 Ala. 448.

While there is old authority to the effect that a landlord's lien will prevail against a claim of exemption, *Ex parte Barnes*, 84 Ala. 540, 4 So. 769, *Bryan v. Kelly*, 85 Ala. 569, 5 So. 346, more recent legislative enactments have been held to confer priority as against the landlord's lien. *Etheredge v. Hester*, 32 Ala. App. 321, 25 So. 2d 523.

As pointed out in the *Etheredge* case, *supra*, the statute creating a landlord's lien has been in our Code since 1821, and since 1879 has provided that such lien is paramount to and has preference over all other liens. However, since present Section 712, Title 7 was enacted in 1915 and amended in 1923 to proclaim that "any levy upon such property is absolutely void," in line with the cases hereinafter cited, it is my opinion that articles enumerated in Section 712, *supra*, hereinabove set out, are beyond the reach of any creditor and creditors cannot subject such property to claims for debt. *May v. Strickland*, 235 Ala. 482, 180 So. 93.

In the case of *Coffman v. Folds*, 216 Ala. 133, 112 So. 911, the Court makes the following statement:

"... It should be observed that the selection prescribed by the statute

that it is not required that the same be made in writing and filed as so required of other exemptions; it being only that an informal yet positive designation of the property be made of the class of exemptions covered by the statute—the purpose being to aid the poor and ignorant and guard such persons and their families from the oppression or inconvenience incident to the delay and uncertainty of making a formal claim of exemptions as is required of the other class of exemptions. Such is the manifest requirement evidenced by a consideration of the legislative history and form of said act. The same intent is manifested by the addition of the words in section 7966 of the Code of 1923 that ‘any levy upon such property is absolutely void.’” See also *Derzis v. Vafes*, 227 Ala. 471, 150 So. 461; and *Pollak et al v. McNeil, et al*, 100 Ala. 203, 13 So. 937.

Since the test in the instant inquiry is whether or not the suit is founded on a debt, and the answer being in the affirmative, the Code section, Section 712, Title 7, definitely applies to the inquiry in question. This section must be given preference to any suit founded on debt, the nature of the suit being *ex contractu*.

Very truly yours,

MacDONALD GALLION

Attorney General

September 1, 1959

Honorable Lee M. Otts

Attorney for Escambia County

Escambia County Board of Revenue

Brewton, Alabama

Mineral Documentary Tax—Deeds—Rights of Way—Highways and Highway Department.

1. Where the state acquires property for right of way, the fee in the land, including minerals, remains in the owner of the abutting property, subject to such easement as the state might have acquired by the act of dedication.

2. The mineral documentary tax is not due on the recording of right of way deed even though the deed contains a reservation or exception of the mineral interest to the grantor.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of August 18, 1959, is as follows:

"On behalf of the Board of Revenue of Escambia County, Alabama, I respectfully request an opinion from your office in regard to the matters and questions set out below.

"Escambia County obtains rights of way for county roads from the various land owners. A copy of the form of the deed used is enclosed. It is believed that this deed conveys only a right of way over the surface of the land and does not affect the title to the oil, gas and other such minerals, title to these minerals remaining in the grantor. Even though this may be true, a large number of the property owners insist that the right of way deeds include an exception or reservation of the mineral rights.

"This reservation has not caused any difficulty until recently. As you know the Legislature in 1953 by Act No. 534 provided for the payment of a documentary or transfer tax whenever an instrument is filed for record conveying or excepting from the conveyance any mineral interest. One of the clerks in the Office of the Probate Judge has informed the County Engineer that this tax must be paid on all right of way deeds filed for record in which there is a reservation or exception of any portion of the mineral interest.

"The tax would usually not be more than the minimum of \$1.00 on each deed, however, it is sometimes difficult to obtain the necessary right of way deeds and if it is necessary to collect even \$1.00 from the land owner he may balk on the transaction. It is my understanding that the County can not pay this tax for the landowner as that would be using tax money to pay a tax due by an individual.

"My questions are as follows:

"1. Do these right of way deeds (copy enclosed) convey any oil, gas or mineral interest, other than surface minerals?

"2. If your answer to question No. 1 is negative, would it be necessary for the Judge of Probate to collect the mineral documentary or transfer tax on such a right of way deed containing an exception or reservation of mineral interests, as actually the exception or reservation does not add anything to the instrument or in any way affect the mineral interest?

"3. If your answer to question No. 1 is affirmative, would it be permis-

sible for the County to pay this tax as a part of the recording fee or as payment for the right of way acquired?

"As we have several right of way deeds which we are holding off on recording until we obtain your opinion, an early reply will be greatly appreciated."

In your request, you refer to Act No. 534, Acts of Alabama 1953. This Act was declared unconstitutional by the Alabama Supreme Court on December 8, 1953 in an advisory opinion to the Governor of the State of Alabama. However, the Legislature passed Act No. 261, Acts of Alabama 1957, page 332, approved August 13, 1957, which levies the mineral documentary tax. Act No. 261, *supra*, was effective on and after October 12, 1957. Quarterly Report of Attorney General, Vol. 89, page 22.

Your first question is answered in the negative. It has been held by this office that the established rule of law in Alabama is that when the state procures a right of way for the purpose of a public highway, whether it be by dedication, purchase, or condemnation, the fee in the land remains in the owner of the land abutting on the road, subject only to such burdens or easement in favor of the public as were conferred by the act of dedication. Quarterly Report of Attorney General, Vol. 22, page 92; Quarterly Report of Attorney General, Vol. 20, page 30; Quarterly Report of Attorney General, Vol. 91, page 15. See also the cases of *Cloverdale Homes v. Town of Cloverdale*, 182 Ala. 419, 62 So. 712; *Western Railway of Alabama v. Alabama Great Trunk Railroad Co.*, 96 Ala. 272, 11 So. 483; *Hobbs v. Long Distance Telephone & Telegraph Co.*, 147 Ala. 393, 41 So. 1003.

Section 2 of Act No. 261, Acts of Alabama 1957, page 332, provides as follows:

"There is hereby levied and shall be paid and collected as herein set forth a documentary or transfer tax (to be known as the mineral documentary tax) upon the filing and recording of every lease and other writing hereafter executed whereby there is created a leasehold interest in and to any non-producing oil, gas or other minerals in, on or under or that may be produced from any lands situated within the State of Alabama, or whereby any such interest is assigned or is extended beyond the primary term fixed by the original instrument, and upon every deed, instrument, transfer, evidence of sale or other writing whereby there is hereafter conveyed to a grantee or purchaser, or excepted or reserved to a grantor separately and apart from the surface any interest in or right to receive royalty from any non-producing oil, gas or other minerals in, on or under or that may be produced from any lands within the State of Alabama. Provided the tax shall not apply to any mortgage or instrument creating a lien upon such interest, not to the sale under foreclosure thereof." (Emphasis added.)

It will be seen from the provisions of Section 2, *supra*, that in order for the mineral documentary tax to be due on the recording of such an instrument, the mineral interest must be conveyed, or excepted or reserved separately and apart from the surface of the land. Quarterly Report of Attorney General, Vol. 93, page 41.

From your inquiry, it is assumed that the owner of the lands included in the right of way deeds in question also own the mineral interest in, on or under such lands. Therefore, since the fee in the land remains in the owner of the land abutting the highway, a reservation or exception of such mineral interest gives the owner no more right or title to such interest than he had before the execution of the instrument and does not create a mineral interest in the owner separately and apart from the surface of the land within the meaning of Act No. 261, *supra*. It is my opinion that the mineral documentary tax is not due upon the recording of such instruments even though they may contain a reservation or exception of the mineral interest to the grantor. Therefore, your second question is answered in the negative.

The above answers make it unnecessary to answer your third question.

Very truly yours,

MacDONALD GALLION
Attorney General

September 2, 1959

Mrs. Alice D. Washam

Tax Assessor

Talladega County

Talladega, Alabama

Motor Vehicles—Licenses—Ad Valorem Taxes.

1. Where a motor vehicle is based in this State on October 1, or where it is brought into this State and based here after October 1 and on or before the last Monday in February, it is subject to assessment for ad valorem taxation, which taxes become due and payable the following October 1.
2. Under such circumstances, and where the tax is due for the preceding year, the Judge of Probate cannot, under the

provisions of Title 51, Section 704(a), as amended, Code of Alabama 1940, lawfully issue a license for such vehicle until the ad valorem tax on same has been paid in the county.

3. Where the motor vehicle involved is not based in Alabama on October 1, at the beginning of the fiscal year, or from said date to and including the last Monday in February, no ad valorem tax would be due in this State on the following October 1, and the Judge of Probate of the county involved can lawfully issue a license for such motor vehicle upon being presented with a certificate from the tax assessor to the effect no ad valorem tax is due on such vehicle.

4. The situs and the base of the motor vehicle on the "law day" is the deciding factor as to whether the ad valorem tax is due the following October 1, and not the domicile or residence of the owner of the vehicle.

5. The motor vehicle license in cases where the motor vehicle is owned by a firm, corporation, or an association is due to be paid in the county in this State where the motor vehicle is principally "used or operated".

Opinion by Assistant Attorney General Burton.

Dear Mrs. Washam:

Your request for an official opinion bearing date of July 31, 1959, is as follows:

"Floyd & Beasley Transfer Company, an Alabama corporation with headquarters at Sycamore in this county, is a qualified interstate common carrier for hire and as such it requires the stationing of equipment in states other than Alabama.

"They desire to buy all their license plates in Talladega County in order that they may help the county and also have better centralized control of their tractors. They contend that they should not have to pay ad valorem tax on the tractors stationed outside the state even though such tractors enter the state occasionally.

"Please advise me as soon as possible if their contention is correct, or if we should collect ad valorem tax on all of the trucks where the tags are bought in this county."

From what you state Floyd & Beasley Transfer Company is an Alabama Corporation, having its principal place of business in this State at

Sycamore, and in Talladega County, Alabama. It is engaged in the trucking business as an interstate carrier, and obviously bases some of its trucks and trailers in other states, but that all of its motor vehicles are from time to time used or operated in Talladega County, Alabama.

The answer to your question will depend upon the facts involved as to each piece of motor vehicle equipment used and operated by Floyd & Beasley within this State, and in Talladega County, as the facts surrounding each such motor vehicle will be the determining factor in ascertaining whether it will be subject to ad valorem taxation in this State.

The license taxes levied for the privilege of operating trucks or tractors over the highways of this State are levied under Title 51, Section 697, Code of Alabama 1940, and the trailer license is fifty per cent of the cost of the license for the motor vehicle by which it is drawn, as provided under Section 703 of the same Code Title. The ad valorem tax on trucks and trailers or semi-trailers, as on other items of personal property, is levied under Title 51, Section 21(e), Code of Alabama 1940. The license taxes on these motor vehicles are separate and distinct taxes from ad valorem taxes, and are levied accordingly. Quarterly Report of the Attorney General, Vol. 81, page 16.

Title 51, Section 704, as amended, Code of Alabama 1940, is supplemental to Section 21(e), *supra*, insofar as the ad valorem tax on motor vehicles is concerned, and in this respect merely prescribes the method of collecting and enforcing the collection of such taxes.

It is true that Section 704, as amended, *supra*, provides that "no license shall be issued to operate a motor vehicle on the public highways of this State" until the ad valorem tax on such motor vehicle has been paid in the county for the preceding year. This has been continuously construed and interpreted to apply only when the ad valorem tax is due to be paid in this State on the motor vehicle involved. Where no ad valorem tax is due, and a certificate to this effect has been made by the tax assessor, then subsection (c) of Section 704, as amended, *supra*, expressly authorizes the Judge of Probate of the county involved to issue a motor vehicle license tag upon being presented with such a certificate from the tax assessor and after the motor vehicle license tax has been paid. Quarterly Report of the Attorney General, Vol. 81, page 81, page 16.

In the case of the license under Section 697, *supra*, and where the truck and trailer involved is owned by a firm, corporation, or an association, then subsection (a) of Section 704, as amended, Title 51, *supra*, appears to require that such motor vehicle equipment be licensed or registered in the county where the equipment is principally "used or operated". Quarterly Report of Attorney General, Vol. 26, page 133, *Cole et al. vs. Gullatt*, 241 Ala. 669, 4 So. 2d 412.

A somewhat different rule prevails in the case of ad valorem taxes. Such taxes when applied to motor vehicles are governed by the same rules and requirements as those which relate to other personal property, and the tax is due in the county in which property has its situs. And in the case of motor vehicles the situs would be in the county in which such vehicles are normally based and kept. That is, the county from which the motor vehicle leaves from and returns to in the normal course of its operation, and where it is usually kept when not in use.

The foregoing being considered, it is entirely possible for such vehicles to be based in a State other than Alabama, and for the ad valorem tax to be due to be paid there, and not in Alabama, although they may be from time to time operated on the public highways of Alabama. Under such circumstances the license tax may be due in Alabama even though the ad valorem tax is not. This is true because of the fact that motor vehicle licenses are levied for the privilege of using the public highways, and the owner of the motor vehicle can be required to pay for this privilege in more than one state. To the contrary, the ad valorem tax is a property tax levied on the value of the motor vehicle as such, and is ordinarily collectible only in the state where the vehicle is based, even though used from time to time in other states. *Cole et al. vs. Gullatt*, supra; *National Dredging Co. vs. State*, 99 Ala. 462, 12 So. 720.

The ad valorem tax year is a fiscal year beginning on October 1 and ending the following September 30. October 1, the first day of such fiscal year, is the "law day" in Alabama for all ad valorem taxes, on both real and personal property. *United States vs. State of Alabama*, 313 U. S. 274, 61 S. Ct. 1011; *International Paper Company vs. Curry*, 243 Ala. 228, 9 So. 2d 8; Quarterly Report of Attorney General, Vol. 76, page 58; and Quarterly Report of Attorney General, Vol. 19, page 167. Subsection (c) of Section 704, as amended, supra, expressly extends the "law day" as to ad valorem taxes where motor vehicles are brought into the state after the first day of October and before the tax assessor has completed his assessments (last Monday in February). Quarterly Report of Attorney General, Vol. 85, page 11, Quarterly Report of Attorney General, Vol. 81, page 73.

Your question then is answered to the effect that where a truck or trailer belonging to the Floyd & Beasley Transfer company has its situs and base in Alabama on October 1 (the first day of the fiscal year), or was brought into Alabama and based here during the period beginning on October 1, and ending when the tax assessor has completed his assessments for that year (last Monday in February), then such truck or trailer would be subject to ad valorem taxes in this state for that fiscal year, and such property taxes would be due and payable on October 1, immediately following such fiscal year. Under such circumstances the Judge of Probate of the county could not lawfully, under the provisions of Section 704, as amended, supra, issue a motor vehicle license for such vehicle until

the ad valorem tax had been paid in the county for said, preceding fiscal year.

On the other hand, if the particular truck or trailer had its situs in another state and was based in that state on October 1, at the beginning of the fiscal year, or until you as tax assessor had completed your assessments for that year, then no ad valorem tax would be due on such motor vehicle in Alabama for that particular year. Upon the tax assessor so certifying this fact to the Judge of Probate the motor vehicle license, if due in the county, could be lawfully issued for the vehicle without the payment of the ad valorem tax.

Very truly yours.

MacDONALD GALLION

Attorney General

September 16, 1959

Honorable Festus M. Shamblin

Tax Assessor

Tuscaloosa County

Tuscaloosa, Alabama

Taxation—Homesteads—Exemptions—Trailers.

Homestead exemption may be allowed on house trailers annexed to realty and occupied as a home where the owner thereof has some interest in the land on which the house trailer is located.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion bearing date of September 1, 1959, is as follows:

"I have some people in this county who buy a House Trailer, and anchor it on their father's lot or on their relatives lot. Then this young couple occupies it as their home, and they live there all the time. So I allow them a homestead exemption. Am I right in allowing them to claim their Homestead exemption. "It is necessary that I have

your official opinion on this question before October 1, as I have allowed about twenty-five people to claim this exemption."

It has been held that, in view of the policy of the homestead laws to secure the householder a home, a homestead may be claimed in a dwelling house owned by the claimant and located on property leased by him. However, the extent of the interest owned by those owning the house trailers is not made clearly to appear.

In the case of *Downey v. Wilber*, 117 Wash. 66, 202 Pac. 256, it was held that a portable bungalow on leased land, in which one resides, may be claimed as a homestead under the statute defining a homestead as the "dwelling house in which the claimant resides and the land upon which the same is situated."

The homestead right is favored under the Constitution and the statutory laws of this State. This is made perfectly clear in the case of *Brock Candy Company v. Elson*, 100 So. 94, 211 Ala. 244, wherein Mr. Justice Bouldin, speaking for the Supreme Court, stated:

"The homestead right is a favored one in Alabama. It is safeguarded by constitutional and statutory provisions. It is part of the public policy of the state to protect the shelter and abiding place of the citizen and his family, within the limits and area defined, until alienated, waived, or abandoned in the manner fixed by law. . ."

In *Griffin v. Chattanooga S. R. Co.*, 30 So. 523, 127 Ala. 570, our Supreme Court again pointed out:

"... the land was the homestead of the plaintiff. It is not the quality and quantity of the estate, but the uses to which the land is devoted, that impresses it with the characteristic of a homestead. "The great controlling purpose and policy of the constitution is the protection—the preservation—of the homestead, the dwelling place. . . . It is the home place—the roof that shelters—the constitution and statutes protect from liability to the payment of debts, and, when the owner is a married man, subject to the restrained alienation. . . . Usually it is accompanied by an estate or interest; but, if it is not, it is the misfortune of the occupant.' "

I call attention to the closing sentence in the quotation above that: "Usually it is accompanied by an estate or interest; but, if it is not, it is the misfortune of the occupant." This case and the others cited herein all clearly show that the homesteader must have some interest not only in the house but in the land the house occupies; that the interest may be a very inferior interest such as a lease for a year or years or a life interest, etc. It is very possible the owners of the house trailers lease the part of the land upon which they anchored their own trailers and, if so, that would, in my opinion, meet the requirements of law.

In the case of *Nolen v. East*, 61 So. 261, 181 Ala. 226, Mr. Justice Anderson, quoting from the case of *Griffin v. Chattanooga S. R. Co.*, *supra*, further quoted from the case of *Tyler v. Jewett*, 82 Ala. 93, 2 So. 905, as follows:

“There is no limitation to any particular estate, either as to duration, quality, or extent. It is the land upon which the dwelling place of the family is located, used, and occupied as a home which the Constitution and statute protects, however inferior may be the title, or limited the estate or interest.” (Emphasis supplied)

May I point you to one additional case. In the case of *Bailey v. D. R. Dunlap Mercantile Company*, 35 So. 451, 138 Ala. 415, the Court remarked as follows:

“It is of no consequence what the character of his estate in any portion of the 120-acre tract was or may have been at the date of the levy. So he had an estate in that portion of the tract upon which he resided, whether a fee or less, is all that is required, provided it was the dwelling place of his family, and was used and occupied as such. Section 2033, Code 1896. ‘There is no limitation to any particular estate, either as to duration, quality, or extent. It is the land upon which the dwelling place of the family is located, used and occupied as a home, which the Constitution and statute protects, however inferior may be the title, or limited the estate or interest.’ *Tyler v. Jewett*, 82 Ala. 93, 2 South. 905; *Griffin v. Chattanooga Sou. R. R. Co.*, 127 Ala. 570, 30 South. 523, 85 Am. St. Rep. 143.”

Section 15, Title 51, Code 1940 provides for the homestead exemption as follows:

“§15. Homesteads.—Homesteads, as defined by the constitution and laws of the State of Alabama, are hereby exempted from all state ad valorem taxes. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed two thousand dollars in assessed value, nor one hundred sixty acres in area. (1936-37. Ex. Sess., p. 113; 1939, p. 702.)”

It would, of course, be necessary for the claimant of the exemption to show that he had a homestead in the property in question. He could not drive his house trailer about from place to place and, while doing so, successfully claim his exemption from taxation. However, although exemption from taxation is the question here involved, the claimant still must show that he has some interest of some kind, however inferior, in the land upon which the house trailer has been anchored. Assuming that this can be shown, it is my opinion that the house trailer and the appurtenance might successfully be claimed as exempt as a homestead.

Very truly yours,

MacDONALD GALLION
Attorney General

September 23, 1959

Honorable Mylan R. Engel

Attorney, Mobile County

Personnel Board

610-613 Van Antwerp Building

Mobile, Alabama

Municipalities—Officers and Offices—Police.

1. The Chief of Police of the City of Prichard is a public officer within the meaning of Section 27(d) of Act No. 470, Local Acts 1939, page 298.

2. A person who is related within the fourth degree to the Chief of Police of the City of Prichard may not hold a position with said City if, in such employment, said Chief of Police would be his superior.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of September 4, 1959, is as follows:

"The Director of the Mobile County Personnel Board has under consideration a request for a provisional appointment of an individual who is related by marriage within the fourth degree to the Chief of Police of the City of Prichard, Alabama, who would be his superior; which may or may not be a violation of Section 27(d) of the Local Civil Service Act. (Local Act No. 470, 1939, Local Acts of Alabama, page 298.)

"The Chief of Police of the City of Prichard has been removed from under the Mobile County Civil Service System under the provisions of Act No. 370, 1953, General Acts of Alabama, page 439.

"Whether such appointment would or would not be a violation of said section would, of course, depend on whether the Chief of Police of the City of Prichard is or is not considered to be a 'Public Officer' within the meaning of said Section (27) (d).

"As attorney for the Mobile County Personnel Board I therefore respectfully request your official opinion on this matter. The Question propounded is as follows:

"Is the Chief of Police of the City of Prichard, Alabama, considered to be a public officer within the meaning of Section 27(d) of Local Act No. 470, 1939 Local Acts of Alabama, page 298?"

As you point out the Civil Service System of Mobile County was established by Act No. 470, Local Acts 1939, page 298. Said Act is applicable to the City of Prichard. It has been amended frequently; however, the provisions of said Act, which apply to the question here under consideration, have never been amended.

Section 27(d) of Act No. 470, *supra*, reads in part as follows:

" . . . Anything in this Act which might be construed to the contrary notwithstanding, no person whether employed at the time of the passage of this Act in the Classified Service as defined in this Act, or who applies for appointment to any position in the Classified Service after the passage of this Act, shall be allowed to fill any position within the Classified Service, or allowed to continue to hold such position, if said person is related by blood or marriage within the fourth degree to the Public Officer who is or would be his or her superior. . . "

Your request states that the Chief of Police of the City of Prichard has been removed from said Civil Service System. The governing body of the City of Prichard was authorized to provide, by resolution or ordinance, for such removal under the provisions of Act No. 370, General and Local Acts 1953, page 439, as last amended by Act No. 708, General and Local Acts 1957, page 1089. Said Chief of Police is under the direct supervision and control of said governing body and he has those powers and duties conferred upon him by such governing body, pursuant to the provisions of Act No. 370, as amended, *supra*.

Words used in statutes are often given divers meanings depending upon the connection in which they are used. The term "public officer" has been given widely varying definitions by numerous courts. 67 C. J. S., Section 2(b), page 101. See *Jeffers v. Wharton*, 29 Ala. App. 428, 197 So. 352.

Since the Chief of Police is under the direct supervision and control of the governing body of the City of Prichard he may, for some purposes, be considered a mere municipal employee. However, for other purposes he should be considered a public official.

In the case of *Beasley v. McCorkle*, 237 Ala. 4, 184 So. 904, the right of a city council to appoint a chief of police was considered. Referring to the chief of police there under consideration the court said:

"However, in the present case there is no doubt of the petitioner's right to the office. So then, we are dealing here with a *de jure* office,

and with a de jure officer in possession of the same, one who has performed the duties of the office as the law directs."

See also the following cases: *Johnson v. State*, 132 Ala. 43, 31 So. 493; *Peinhardt v. West*, 212 Ala. 83, 101 So. 736; *Ingram v. Evans*, 227 Ala. 14, 148 So. 593; *Commonwealth v. Hubbs*, 137 Pa. Super 244, 8 Atl. 2d 618; and *Edge v. Town of Cayce*, 187 S. C. 171, 197 S. E. 216.

Many of the cases which hold a chief of police to be a public officer stress the fact that his duties involve the exercise of a portion of the sovereign powers granted to municipalities by the states and the fact that his office is created by statute or ordinance.

Premises considered, I am of the opinion that the Chief of Police of the City of Prichard is a public officer within the meaning of Section 27 (d) of Act No. 470, supra.

Therefore, you are advised that the contemplated appointment to which your request refers may not be made.

Very truly yours,

MacDONALD GALLION

Attorney General

September 24, 1959

Honorable Frank R. Stewart

State Superintendent of Education

Department of Education

State Office Building

Montgomery, Alabama

Schools—Funds—Buildings.

1. Two hundred fifty thousand dollars (\$250,000) of the board of education of each county of this State to be used "... to pay for school buildings constructed not more than three years before the effective date ..." of Act No. 126, approved August 24, 1959, means that the building must be started and completed in a manner suitable for the purposes for which built within said three year period.

2. "... to pay any debt contracted for the construction of

any school building constructed not more than three years before the effective date . . ." of Act No. 126, approved August 24, 1959, means that if a debt has been contracted even before three years immediately prior to the effective date of said Act, and the building has been completed in a manner suitable for the purposes for which built within said three year period, funds under the Act may be used to pay the debt for said construction.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of September 15, 1959, is as follows:

"Subsection (c) of Section 10 of Act 126, approved August 24, 1959, reads as follows:

" 'Two hundred fifty thousand dollars (\$250,000) shall be paid to the board of education of each county in this State, to be used for the reconstruction, alteration, equipment, and improvement of existing school buildings, or to pay for school buildings constructed not more than three years before the effective date of this Act, or to pay any debt contracted for the construction of any school buildings constructed not more than three years before the effective date hereof, and for new construction; provided, that such funds so distributed shall be apportioned among the county board of education and the city boards of education within the county, pro rata, on a teacher unit basis.'

"You will note that it is possible to use the funds authorized by this subsection 'to pay for school buildings constructed not more than three years before the effective date of this Act, or to pay any debt contracted for the construction of any school buildings constructed not more than three years before the effective date hereof, and for new construction; . . .' There is a similar statement in Subsection (d) of this same Section.

"I have been asked to obtain an official opinion from you with regard to the meaning of the quotation which appears in paragraph 2 above. Specifically, the question is as follows:

"Does the threeé year limitation mean three years from the date contract was let for construction of the building, or three years from the date the actual construction of the building began, or three years from the completion of the building, or three years from the final date payment was made to the contractor, or does it have a different meaning?"

In order to properly answer your inquiry, I deem it expedient to divide the purposes for which the pertinent funds may be used.

The first is to pay for school buildings constructed not more than three years before August 24, 1959, the effective date of Act No. 126, approved August 24, 1959.

"Construct" means in its ordinary sense that which is built, formed or constructed; to put together the constituent parts in their proper place or order. Webster's New International Dictionary (Second Edition).

The word "erect" is defined in Anderson's Law Dictionary, page 410; to lift up, build, construct; as to erect a building, a fixture.

It is my opinion that school buildings, as such, constructed not more than three years before August 24, 1959, means, as used in said Act No. 126, that they must be started and completed in a manner suitable for the purpose for which built within said three year period.

If part of the work done and materials furnished is beyond the three year period, the building is not in my opinion constructed within the three year period, although the remaining work done and materials furnished is within said period.

The second part of Act No. 126 to be considered is that which provides that the funds may be used to pay any debt contracted for the construction of any school building constructed not more than three years before the effective date of said Act.

Here, again, constructed means erected and completed in a manner suitable for the purposes for which built. However, in my opinion, the debt may have been contracted prior to the three year period. So considered, if a debt has been contracted for a school building more than three years immediately prior to the effective date of said Act No. 126, and the building has been completed as aforesaid within said three year period, funds under the Act may be used to pay the debt for said construction.

Yours very truly,

MacDONALD GALLION

Attorney General

September 24, 1959

Honorable Frank R. Stewart

State Superintendent of Education

Department of Education

State Office Building

Montgomery, Alabama

Schools—Funds—Buildings

Under Act No. 126, approved August 24, 1959, if local school boards have appropriated money from local funds for new school building construction prior to the effective date of said Act, and within three years immediately prior thereto, and said funds are being used for school buildings under construction at the time the above Act became effective, the funds may be counted as matching funds under said Act even though the plans and specifications for and the construction of said buildings have not been under the supervision of the Alabama Building Commission.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of September 15, 1959, is as follows:

“Paragraph 2 of Subsection (d), Section 10, Act No. 126, approved August 24, 1959, reads in part as follows:

“All money distributed or disbursed from the special fund provided for herein shall be used solely for the purposes specified in this act; and the preparation of all plans and specifications for any building constructed wholly or in part with any of the money, and all work done hereunder in regard to the construction, reconstruction, alteration, and improvement of school buildings, shall be supervised by the Alabama Building Commission, or any agency that may be designated by the Legislature as its successor.”

“There was a considerable number of school buildings under construction at the time of the passage of this Act and it is entirely possible others have been started since August 24, 1959. I shall appreciate an official opinion from you in answer to the following question:

"Can the funds used for the construction of the buildings mentioned above be counted as matching funds, even though the plans and specifications of the buildings, as well as the construction of the building, have not been under the supervision of the Alabama Building Commission."

Before the passage of Act No. 126, Second Special Session 1959, approved August 24, 1959, the selection of sites, the construction of school buildings, the alteration and improvement of existing school buildings rested with county and city boards of education acting on the advice of their superintendents of education and in accordance with rules and regulations promulgated by the State Board of Education and the building code promulgated by the Alabama Building Commission. Sections 15, 161, 183, 184, 99, 71, 72, 113 and 117, Title 52, Code of Alabama 1940; *Mullins v. Board of Education*, 249 Ala. 44, 29 So. 2d 339; Quarterly Report of Attorney General, Vol. 40, page 40; Quarterly Report of Attorney General, Vol. 15, page 67.

The money to be received by city and county boards of education under Section 10 of Act No. 126, *supra*, is to be used as follows:

"(c) Two hundred fifty thousand dollars (\$250,000) shall be paid to the board of education of each county in this State, to be used for the reconstruction, alteration, equipment, and improvement of existing school buildings, or to pay for school buildings constructed not more than three years before the effective date of this Act, or to pay any debt contracted for the construction of any school buildings constructed not more than three years before the effective date hereof, and for new construction; provided, that such funds so distributed shall be apportioned among the county board of education and the city boards of education within the county, pro rata, on a teacher unit basis.

"(d) One-half of the remainder of the proceeds of the bonds shall be distributed to and apportioned among the several city and county boards of education, pro rata, on the basis of teacher units as determined in accordance with the minimum school program for the school year 1959-1960, and shall be used for the reconstruction, alteration, equipment, and improvement of existing school buildings, or to pay for school buildings constructed not more than three years before the effective date of this Act, or to pay any debt contracted for the construction of any school buildings constructed not more than three years before the effective date hereof, and for new construction; and the other one-half of the remainder of the proceeds of the bonds issued hereunder shall be apportioned, pro rata, among the sixty-seven county boards of education on a teacher unit basis as determined in accordance with the minimum school program for the school year 1959-1960, provided the county board of education shall receive only such sum as shall be equal to the amount which the county board of educa-

tion, the city boards of education within the county, and the incorporated municipalities within the county do appropriate or have appropriated from local funds for new school construction during the three years immediately preceding the effective date of this Act, and certify to the secretary of the Authority that they have so appropriated. The said county board of education shall allot any funds received in this matching portion between the county board of education and the city board or boards of education located in the county on the basis of the teacher units credited to the respective boards."

Subsection (d) then provides in paragraph 2 thereof, the following in pertinent part:

"All money distributed or disbursed from the special fund provided for herein shall be used solely for the purposes specified in this act; and the preparation of all plans and specifications for any building constructed wholly or in part with any of the money, and all work done hereunder in regard to the construction, reconstruction, alteration, and improvement of school buildings, shall be supervised by the Alabama Building Commission, or any agency that may be designated by the Legislature as its successor. The Authority and the Building Commission shall agree to a construction cost estimate for each building constructed wholly or in part with any of the money provided for in this Act and reimbursement shall be made to the Commission for its reasonable direct costs in having plans, specifications and contract documents prepared and in supervising and inspecting the work."

It seems to me, in view of the above and in order to give effect and meaning to all parts of Section 10, *supra*, it must be construed so that new construction, reconstruction, alteration, equipment, and improvement of existing school buildings shall be supervised by the Alabama Building Commission only if such occurs after the approval of Act No. 126, *supra*.

The cost of school buildings constructed not more than three years before the effective date of Act No. 126, *supra*, and debts contracted for the construction of any school building constructed not more than three years before the effective date thereof may be paid from the funds provided by said Act. This may be done even though the plans and specifications of the buildings and their construction were not under the supervision of the Alabama Building Commission.

As to the matching feature of subsection (d), it is provided the county board of education shall receive only such sum as shall be equal to the amount which the county board of education, the city boards of education within the county and the incorporated municipalities within the county do appropriate or have appropriated from local funds for new school construction during the three years immediately preceding the effective date of Act No. 126, *supra*. The county board of education then allots the funds received in this matching portion between the county board of education

and the city boards of education located in the county on the basis of the teacher units credited to the respective boards.

It is the appropriation from local funds for new school construction during the three year period which is a condition precedent to obtaining matching state funds under Act No. 126, supra.

If under the Act local funds have been appropriated for new school construction prior to the effective date of the Act, and within the three year period, and said funds are being used for school buildings under construction at the time of the passage of the Act, these funds may be counted as matching funds even though the plans and specifications and the construction have not been under the supervision of the Alabama Building Commission.

As to school buildings, the construction of which may have started since August 24, 1959, the effective date of Act No. 126, supra, I express no opinion at this time but prefer to have presented each case as it may arise so that the facts relative to each may be before me.

The above, I believe, will suffice to answer the question submitted to me.

Yours very truly,

MacDONALD GALLION

Attorney General

September 24, 1959

Honorable Slaughter McMahan

President, Board of Revenue

Etowah County

Gadsden, Alabama

Counties—Courthouses—Janitors—Etowah County.

1. The Court of County Commissioners or other like governing body of a County may contract for janitorial services for the courthouse.

2. The provisions of Act No. 398, General and Local Acts of

1955, page 933, relating to Etowah County are not applicable to such contract.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of August 28, 1959, is as follows:

"The Board of Revenue of Etowah County, Alabama, has requested me, as Chairman of the Board, to request an official opinion on the following question.

"We find, upon investigation, that the present cost to the County for janitorial services in keeping the Etowah County Courthouse clean is costing an exorbitant amount. We believe that we could contract the janitorial services out to some person or corporation at a much less cost than the County is now paying.

"The question which we would like your office to render an opinion on is:

" 'Can the Board of Revenue of Etowah County, Alabama, contract with an individual, association or corporation for the furnishing of janitorial services for the Etowah County Courthouse?'

"If your answer to the above question is in the affirmative, please state whether or not competitive bidding for such a contract is mandatory under the law now applicable to Etowah County.

"Your usual prompt attention to this matter will be greatly appreciated."

My answer to your first inquiry is in the affirmative.

Title 12, Section 12, Subdivision (2), Code of Alabama 1940, as amended, provides that it shall be the duty of the Court of County Commissioners or other like governing body to provide a janitor for the courthouse and to see that said janitor keeps clean and in a sanitary condition all courtrooms, corridors, halls and offices in the courthouse.

If the Court of County Commissioners of your county feels that it can more economically provide janitorial services for the Etowah County Courthouse by contracting the same out, then, in my opinion, it has the legal authority to do so. I know of no legal inhibition which would prohibit such contract if the Court of County Commissioners determines

that this method is the best and most feasible way to provide janitorial services as required by Subsection 2, supra. Quarterly Report of Attorney General, Vol. 18, page 159.

Such janitorial service contract does not come under the provisions of Section 8 of Act No. 398, page 933, General Acts of 1955, the act presently applicable to purchases in your county. This section provides that the board shall receive public competitive bids for all purchases in excess of \$150.00. The section is completely silent as to purchasing personal service under contract. In my judgement, this section is limited to and is only applicable when the board purchases personal property for county use.

You are, therefore, advised that it is not necessary for the board to accept or consider competitive bids in awarding janitorial services for the courthouse.

Yours very truly,

MacDONALD GALLION

Attorney General

September 25, 1959

Honorable Frank R. Stewart
State Superintendent of Education
Department of Education
State Office Building
Montgomery, Alabama

Schools—Funds—State Department of Education.

1. (a) Where the total assessed valuation of the state on property is to be used in recalculating the index for the minimum school program, cannot be ascertained by the State Department of Education until after October 1, of the first fiscal year for which the index is to be recalculated, a tentative index may be used based upon the most recent available data until the assessed valuation becomes available. (b) When the assessed valuation becomes available another index is to be prepared with the necessary adjustments between the tentative index and that which is made later upon receipt of the

assessed valuation of the state, which was not available before said October 1.

2. Under Title 52, Section 212, Code of Alabama 1940, "shall recalculate the index on the basis of the most recent available data once every two years," means that it must be done at least once but does not prohibit a tentative index if necessary within said period to properly carry out the purposes of the Minimum School Program.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of September 16, 1959, is as follows:

"Under the provisions of Section 213, Title 52, Code of Alabama 1940, the amount of local funds available for the Minimum School Program for the State of Alabama is \$4,676,485. Section 214 of this title provides that 'The state board of education shall determine the total local funds available to each county, including the cities therein, to provide the minimum school program by multiplying its average index of financial ability as provided in section 212 of this title by the total local funds available to provide the state minimum school program as provided in section 213 of this title and the product shall be counted as the local funds available to said county, including the cities therein, to provide the minimum school program.' The average index of financial ability referred to in the quotation is found by adding the economic index of each county as provided in section 210 of this title to its assessed valuation index as provided in section 211 and dividing the sum by 2, the quotient being the average index of financial ability.

"Enclosed you will find a copy of a letter from Dr. Cranford H. Burns, Superintendent of Mobile Public Schools, in which he takes issue with the method used by this office in the last calculation of the average index as described in my letter to him under date of March 24, 1959. You will note that the only question involved is with respect to the calculation of the assessed valuation index.

"In accordance with his request, I am writing you to ask for an official opinion regarding the following questions:

"1. Does the method of calculating the assessed valuation index as described in my letter of March 24 to Dr. Burns meet the requirements prescribed by law?

"2. In the event your answer is in the negative, in what respect or respects does it fail to meet those requirements?

"In view of the facts that the final apportionment of minimum program funds for the present fiscal year must be made at the end of this month, and in further consideration of the fact that your opinion may have a direct bearing on the amount of the apportionment to which the Mobile Schools shall be entitled, I respectfully ask your immediate attention to this request."

Act No. 346, General Acts 1939, page 479, provided for the first time that which is now contained in Title 52, Section 213, Code of Alabama 1940. The pertinent act and statute being as follows:

"The state board of education shall determine the total local funds available to provide the minimum school program for the entire state as follows: Multiply one-half of one percent by the total assessed valuation of the state on which taxes were due and collectible for the fiscal year beginning October 1, 1938, and the product shall be counted as the total local funds available for the support of the state minimum school program."

Title 52, Section 212, Code of Alabama 1940, provides that the State Board of Education shall recalculate the index on the basis of the most recent available data once in every two years. This includes the economic index for each county as provided in Section 210, 211 of Title 52, Code of Alabama 1940, as well as the assessed valuation of the state.

When Act No. 346, supra, was approved September 11, 1939, it contained this language "Multiply one-half of one percent by the total assessed valuation of the state on which taxes were due and collectible for the fiscal year beginning October 1, 1938." (Emphasis supplied.)

Taxes due and collectible for the fiscal year beginning October 1, 1938, would not be due and collectible until October 1, 1939.

By Section 7 of the act, however, the provisions of the act did not become effective until October 1, 1939. When so considered there is no conflict in the language used.

The purpose of Act No. 346, supra, is to provide for the calculation of indices of financial ability of each county, including the cities therein, to support the minimum school program, and to provide for the use of said indices in apportioning the minimum program fund. It is an average index based in part on matters foreign to the assessed valuation of property for state purposes.

The proper consideration of the questions presented call for con-

sideration of all the pertinent statutes and not just the one relating to property values for tax purposes.

As above pointed out, the State Board of Education shall recalculate the index on the basis of the most recent available data once in every two years.

There is no time set for this calculation during the two year period. The statute commands that it shall be done once in every two years, but does not provide that it may not be done more than once.

It is likewise to be noted that after fixing the fiscal year beginning October 1, 1938, it does not expressly provide October 1, every two years thereafter. After the first date fixed, namely, October 1, 1938, no other date is fixed except by implication.

By Title 52, Section 211, Code of Alabama 1940, it is provided that the State Board of Education shall calculate for each county including the cities therein, its per cent of total assessed valuation of the state and said per cent shall be the assessed valuation index for the county.

If, as contended by some, the first period for ascertaining the assessed valuation for state purposes is fixed by the statute by the expression "on which taxes were due and collectible for fiscal year beginning October 1, 1938"; that every two years thereafter is by implication likewise fixed; that only one index may be prepared during this period, a practical problem is presented which makes this construction unworkable.

Under Title 51, Section 64, Code of Alabama 1940, when the book of assessments has been completed in triplicate, one copy is sent to the Department of Finance, another to the Department of Revenue, and the third to the tax collector.

The above must be done not later than the second Monday in August of each year. Any tax assessor who fails for five days after said date to file with the Department of Finance the abstract of assessment of his county is to be reported to the Governor, who shall forthwith require of such tax assessor an official report of such failure.

Inquiry has revealed to me that it is uniformly sometime in November of each year before all the reports are in so that the assessed valuation for state purposes may be correctly ascertained.

Under the every two-year theory, the index must be based on taxes due and collectible October 1, 1959. These are valuations which should be finally fixed by the assessors not later in any event than the second Monday in August, 1959. However, the computing tax value is not available for the fiscal year beginning October 1, 1959, until sometime in November.

So for over a month there is no new index data upon which to base the calculation if the two-year theory is followed.

In order to give effect to all parts of the statutes so that a workable solution may be found, it is suggested that for the fiscal year beginning October 1, 1959, a tentative index be prepared based upon the most recent available data. This could be in part upon the tax valuation for the taxes due and collectible October 1, 1958. After the tax valuation for taxes due and collectible October 1, 1959, are ascertained, that a final calculation or index be made for the fiscal years ending September 30, 1960, and September 30, 1961. Necessary adjustment to be made between the tentative figures and those which become final after the tax values for the taxes due and collectible October 1, 1959, are ascertained.

It is my opinion that such tentative calculation is not legally prevented by "shall recalculate the index on the basis of the most recent available data once in every two years." The command that a thing shall be done once in every two years is not a prohibition against other calculations if necessary within said period to properly carry out the purposes of the Minimum School Program.

Since the method heretofore employed by you and which is outlined in your letter to Superintendent Burns is substantially in accord with this opinion, your first question is answered in the affirmative. This renders it unnecessary to answer your second question.

I do wish to point out, however, that the final calculation is to be made for the first of the two fiscal years which are odd and not even years. As pointed out above, Act No. 346 became effective October 1, 1939, an odd year.

Yours very truly,

MacDONALD GALLION

Attorney General

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